IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13649 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RANGE FOREST OFFICER - Petitioner(s)
Versus
VASNATBEN JIKABHAI - Respondent(s)

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Appearance :

GMR LB DABHI Ld. AGP for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1,
MR TR MISHRA for Respondent(s) : 1,
MR UT MISHRA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 25/04/2006

ORAL JUDGMENT

1. Heard the learned AGP, Mr.Dabhi, appearing on behalf of petitioner and learned

Advocate, Mr.T.R.Mishra, appearing on behalf of respondent.

2. This Court has issued rule made it returnable on 6th February,2006. Today, with the consent of learned Advocates appearing for the parties, matter is taken up for final hearing.

3. In the present petition, the petitioner – Range Forest Officer has challenged the award passed by Labour Court, Junagadh in Reference No.255 of 1995 dated 27th August,2004, wherein, the Labour Court has directed to the petitioner to reinstate the workman in service with continuity and with 15% back wages of interim period. The said award is required to be implemented within a period of 30 days from the date of publication.

4. Learned AGP, Mr.Dabhi, submitted that before the Labour Court, following contentions have been

raised by the petitioner.

(i) The petitioner is not an “industry” within the meaning of Section 2(j) of the I.D.Act,1947.

(ii) The petitioner was having seasonal work wherein respondent workman was working and, therefore, according to requirement in monsoon season, respondent was employed by petitioner. Thereafter, as and when work is over, her service was terminated.

(iii) The relevant documents were produced by the petitioner and other record was bulky, same was not produced, but it was made clear that if respondent wants to see such documents, then, her Advocate can see the record.

(iv) The respondent workman has stopped coming on duty and there was no termination from

petitioner.

(v) That 240 days' continuous service is not proved by respondent.

(vi) There are two letters Exh.13 and Exh.14 calling the respondent to report for duty, but she has not reported for duty. Therefore, 15% back wages granted by Labour Court is required to be set aside.

Except that, no other contentions are raised by learned AGP, Mr.Dabhi.

5. Learned Advocate, Mr.T.R.Mishra, submitted that Labour Court has rightly examined the matter on the basis of evidence, for that there is no error committed by the Labour Court. He also submitted that Labour Court has given cogent reasons in support of its conclusion and has rightly appreciated the oral as well as

documentary evidence produced by both the parties. He also submitted that initial burden upon the employee to prove the continuous service of 240 days and thereafter, the burden is discharged by oral evidence of the workman and then, it shifts to employer to disprove the said facts. Learned Advocate, Mr.Mishra, also submitted that 240 days has been proved before the Labour Court, despite that the service of workman has been terminated by the petitioner and in response to two letters Exh.13 and Exh.14, workman had gone to report for duty, but she was not allowed to resume the duty by the petitioner as per her evidence and, therefore, according to him, Labour Court has rightly dealt with the matter, for that no interference is necessary.

6. I have considered the submissions made by learned Advocates appearing for the parties and have perused the award passed by Labour Court, Junagadh. The questions which are raised by

learned AGP, Mr.Dabhi, whether the petitioner is an 'industry' or not. In the evidence of Sureshchandra Damjibhai, Exh.25, a witness of the petitioner, he has in terms admitted in cross-examination that Forest Department is selling Gum and Sukasarpan. This sentence is enough to cover the petitioner in the definition of 'industry'. This sentence is noted at Page-41 by Labour Court in cross-examination of the witness. The contention raised by petitioner that petitioner is not an 'industry', then, it is burden upon the petitioner to prove that department in which the respondent workman was working, is performing sovereign function. That aspect has not been proved by petitioner before Labour Court by leading evidence. One witness was examined by petitioner in his Chief Examination, there is no evidence in his deposition that petitioner is performing the sovereign function or not carried out any systematic activities covered by definition of 'industry'. No evidence

has been led by petitioner to prove the contention that, whether petitioner is covered by definition of 'industry' or not. So merely raising the contention is not enough, but it should have to be proved before the Court. In the decision of the Full Bench of this Court specifically made it clear that if any systematic activities carried out to satisfy the human wants and to render the services to the mankind without any motive of profit or loss with the help of employer employee relation, then, that activity is covered by definition of 'industry'. This triple test is squarely satisfied in the facts of this case looking to the cross-examination of Sureshchandra Damjibhai. Once Forest Department selling the article, then, they are manufacturing that product and to sell it to public, then, it amounts to an 'industry' and, therefore, that contention has been rejected which has been raised by learned AGP, Mr.Dabhi.

7. The second contention is that initial burden upon the workman to prove 240 days' continuous service. The evidence of respondent workman - Vasantben Popatbhai at Exh.9, she has deposed before the Labour Court that she was working in Nursuary Department, Sondarda Village for more than 10 years and her service was terminated on 15th May,1995 and immediately on 1st August,1995, after termination, notice was sent to the petitioner and thereafter, petitioner has not reinstated the respondent and, therefore, dispute was raised which referred for adjudication. That she was working as daily wager; her presence was registered in muster and wages was paid according to the working days. A specific denial has been made by the respondent that she was not only working in monsoon season, but she was working continuously with the petitioner. She also denied the fact that she has not stopped to report for work and she has not filed false case against the petitioner. Therefore, in light of

her evidence, the initial burden discharged by the workman. That she was remained in continuous service for more than 10 years with petitioner. Once burden is discharged by oral evidence, then, it is burden upon the employer to disprove the facts on the basis of record to be produced before the Court and by oral evidence. It is clear from the record that no appointment order was issued in favour of respondent; no pay slip was given to the workman; no copy of muster has been given by the petitioner; no identity card has been supplied by the petitioner and not a single document has been supplied to the respondent by the petitioner from which respondent can prove by documentary evidence that respondent has rendered 240 days' continuous service. At this stage, learned AGP, Mr.Dabhi, brought to the notice of this Court that at Page-24, wherein, in cross-examination the witness of petitioner has deposed before the Labour Court that presence card is provided to labourers, but

he is not sure that whether such presence card has been supplied to the respondent or not. Therefore, looking to even cross-examination of the witness of the petitioner, it is not proved that presence card was supplied to the respondent or not. The witness, who was examined by petitioner, was having experience of 3 and ½ years to the site, but earlier period he has no experience or knowledge or any information received to the working of the respondent. Therefore, considering his evidence which was taken on 23rd December,2003 and prior to 3 and ½ years, he was posted at Keshod RFO in the year 1999-2000. The service of respondent workman was terminated in the year 1995, naturally this witness has no knowledge in respect to the appointment of the respondent and continuous service of the respondent. So the witness Sureshchandra Damjibhai is not able to point out any factual aspect against the respondent when he was not there at all in the year 1995. Therefore,

according to my opinion, in absence of documents, workman has to prove by oral evidence before the Labour Court. This fact is required to be disproved by the petitioner by documentary evidence. It is a fact that complete record of muster card, presence card and pay register was not produced before the Labour Court. In absence of that, Labour Court has rightly come to the conclusion that 240 days' continuous service is proved and provisions of Section 25F of the I.D.Act,1947 has been violated and therefore, the termination is bad.

8. In similar case, the Apex Court has examined where workman is not able to prove 240 days' continuous service on the basis of documents and documents have been demanded by the workman from the employer, in such a situation, how the burden is discharged has been discussed by the Apex Court in case of R.M.Yellatti Vs. Assistant Executive Engineer, reported in AIR 2006 SC 355.

Relevant observations are in para No.16,17 and 18, which is quoted as under :

> “16.In the case of M.P. Electricity Board (supra), the workmen were engaged by the board on daily wages for digging pits to erect electric polls. It was the case of the board that on completion of the project, the employment was terminated and whenever a similar occasion arose for digging pits, the workmen were re-employed on daily wages and, therefore, their employment was not permanent in nature nor had the workmen completed 240 days of continuous work in a given year. The project jobs came to an end in 1991 and the workmen were never re-employed by the board. Being aggrieved by the said non-employment, the workmen filed applications under MP Industrial Relations Act seeking permanent employment, primarily on the ground that they have completed 240 days in a year and their discontinuation of service amounted to retrenchment without following the legal requirements. The board denied the allegations made in the application before the labour court. An application was moved before the labour

court by the workmen seeking direction to the board to produce the muster roll for the concerned period. However, no other material was produced by the workmen to establish the fact that they had worked for 240 days continuously in a given year. Some of the workmen were also examined before the labour court. However, no document was produced in the form of letter of appointment, receipt indicating payment of salary etc. After examining the entry in the muster rolls, the labour court came to the conclusion that the workmen had not worked for 240 days continuously in a given year, hence, they could not claim permanency nor could they term their non-employment as retrenchment. Aggrieved by the award of the labour court, the workmen preferred an appeal before the industrial court at Bhopal which took the view that since the board has failed to produce the entire muster roll for the year ending 1990, an adverse inference was required to be drawn against the board and solely based on the said inference, the industrial court accepted the case of the workmen that they had

worked for 240 days continuously in a given year. Accordingly, the industrial court granted reinstatement to the workmen with 50% back wages. Drawing of such an adverse inference was challenged before this Court by the MP Electricity Board. In the light of the aforestated facts, this court opined that the industrial court or the High Court could not have drawn an adverse inference for non-production of the muster rolls for the years 1990 to 1992, particularly in the absence of a specific plea by the claimants that they had worked during the period for which muster rolls were not produced. This court observed that initial burden of establishing the factum of their continuous work for 240 days in a year was on the workmen and since that burden was not discharged, the industrial court and the High Court had erred in ordering reinstatement solely on an adverse inference drawn erroneously.

17. Analyzing the above decisions of this court, it is clear that the provisions of the Evidence Act in terms do not apply to

the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the

claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.

18. Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box. He had called upon the management to
produce the nominal muster rolls for the period commencing from 22.11.1988 to 20.6.1994. This period is the period borne out by the certificate (Ex.W1)

issued by the former Asstt. Executive Engineer. The evidence in rebuttal from the side of the management needs to be noticed. The management produced five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex.M4 and Ex.M5, which indicated that the workmen had worked for 43 days during the period 21.1.1994 to 20.2.1994 and 21.3.1994 to 20.4.1994 respectively. There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for discarding the said certificate. In the circumstances, we are of the view that the division bench of the High Court ought not to have interfered with the concurrent findings of fact recorded by the labour court and confirmed by the learned single judge vide order dated 7.6.2000 in writ petition no.17636

of 2000. This is not, therefore, a case where the allegations of the workman are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workman was working in SD-1, Athani and Ex.W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No.1, Athani-591304. In the present case, the defence of the management was that although Ex.W1 refers to the period 22.11.1988 to 20.6.1994, the workman had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the labour court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this judgment on the shifting of the burden. We are not placing this case on drawing of adverse inference. In the present case, we are of the view that the workman had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the division bench of the High Court had erred in interfering

with the concurrent findings of fact.”

9. In view of the above observations made by the Apex Court and considering the factual aspect of the present case, the respondent workman was employed by petitioner and continuously worked upto 10 years' period. Her service was terminated by oral order on 15th May,1995 and thereafter, before the Labour Court, a demand was made by the workman to produce relevant documents from 1985 to 1995. All the documents were not produced by the petitioner. Therefore, Labour Court has rightly drawn adverse inference against the petitioner and for that, Labour Court has not committed any error while passing such award. The record was produced for the period 1992 to 1995 and not from the year 1985. The Labour Court has rightly dealt with oral and documentary evidence and come to the conclusion that workman has proved continuous service of 240 days. The petitioner has violated the provisions of Section

25F of the I.D.Act,1947 and, therefore, order of termination become *ab initio void* which requires reinstatement of the respondent workman. The petitioner is covered by the definition of 'industry' on the basis of cross-examination of the witness Sureshchandra Damjibhai that Forest Department is selling Gum and Sukasarpan to the public at large. This being enough to cover the petitioner in the definition of 'industry'. The petitioner has not proved that they are performing sovereign function. Therefore, considering the entire matter as well as oral and documentary evidence of the workman and witness of petitioner, the Labour Court has rightly come to conclusion and granted reinstatement with continuity of service and 15% back wages of interim period. The Labour Court has rightly considered and not granted full back wages of interim period and only granted 15% back wages. For that, Labour Court has not committed any error which requires any interference by this

Court while exercising the powers under Article 227 of the Constitution of India. Therefore, the contentions raised by learned AGP, Mr.Dabhi, are rejected. Accordingly, there is no substance in the present petition. Present petition is dismissed. Rule is discharged. Interim relief, if any, stands vacated.

(H.K.RATHOD,J.)

(vipul)